95-591

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). The question presented in this case is:

Whether, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad, the tax imposed by Section 4371 of the Internal Revenue Code violates the Export Clause of the Constitution of the United States (U.S. Const. Art. I, § 9, Cl. 5).

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INTERNATIONAL BUSINESS MACHINES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 59 F.3d 1234. The opinion of the Court of Federal Claims (App., *infra*, 12a-30a) is reported at 31 Fed. Cl. 500.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a) was entered on July 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States provides, in relevant part:

a. Art. I, § 8, Cl. 3:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

b. Art. I, § 9, Cl. 5:

> No Tax or Duty shall be laid on Articles exported from any State.

c. Art. I, § 10, Cl. 2:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws * * *.

2. The Internal Revenue Code provides, in relevant part:

a. 26 U.S.C. 4371:

> There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer, a tax at the following rates:
>
> (1) 4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indem-

> nity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);
>
> * * * * *

b. 26 U.S.C. 4372:

> (a) For purposes of section 4371, the term "foreign insurer or reinsurer" means an insurer or reinsurer who is a nonresident alien individual, or a foreign partnership, or a foreign corporation. * * *
>
> (b) For purposes of section 4371(1), the term "policy of casualty insurance" means any policy (other than life) or other instrument by whatever name called whereby a contract of insurance is made, continued, or renewed.
>
> * * * * *
>
> (d) For purposes of section 4371(1), the term "insured" means—
>
> (1) a domestic corporation or partnership, or an individual resident of the United States, against, or with respect to, hazards, risks, losses, or liabilities wholly or partly within the United States, * * *
>
> * * * * *

c. 26 U.S.C. 4373 (1982):[1]

> The tax imposed by section 4371 shall not apply to—
>
> > (1) Any policy, indemnity bond, or annuity contract signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business; * * *
>
> * * * * *

d. 26 U.S.C. 4374:

> The tax imposed by this chapter shall be paid, on the basis of a return, by any person who makes, signs, issues, or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued, or sold. * * *

STATEMENT

1. Respondent International Business Machines Corporation brought this suit in the Court of Federal Claims to obtain a refund of $1.5 million in taxes assessed under Section 4371 of the Internal Revenue

[1] This provision was amended in 1988 to conform its language to terminology elsewhere employed by Congress to describe activities that are "effectively connected" to activities within the United States and are therefore subject to the federal income tax. See 26 U.S.C. 864(c), 882(a)(1). The amendment does not alter the application of the statute in the context of this case.

Code. IBM does not dispute that the taxes were correctly assessed under the statute. Instead, IBM contends that the statute is unconstitutional as applied to the facts of this case.

a. Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)).[2] The tax is to be paid by "any person * * * for whose use or benefit" the policy is "made, signed, issued, or sold." 26 U.S.C. 4374.

Section 4371 was enacted in 1942 to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942). The tax therefore does not apply if the insurance policy issued by the foreign insurer is "signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business." 26 U.S.C. 4373(1) (1982). See also note 1, *supra*; 26 C.F.R. 46.4371-2(a).

b. IBM manufactures a variety of business products that it sells throughout the world. During the period involved in this case, IBM shipped products for international sales from its manufacturing facilities in Arizona, California, Colorado, Florida, Minnesota, New York, North Carolina, Virginia and Texas (App., *infra*, 13a-14a). IBM made its inter-

[2] The term "foreign insurer" is defined to mean an insurer "who is a nonresident alien individual, or a foreign partnership, or a foreign corporation" (26 U.S.C. 4372(a)).

national sales through a network of more than one hundred wholly owned subsidiares (*id.* at 14a-15a):

> Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders. * * *
>
> Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were destined for a United States airport (typically, John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the Far East), but some shipments were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for two to five days, but could remain * * * as long as thirty days. The products would be reloaded at the freight forwarders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, they were unloaded, cleared customs, and loaded on trucks for shipment to their final destination.

The terms of sale specified that title to the goods, and risk of loss, passed from IBM to its foreign subsidiaries only when the goods cleared customs in the foreign country. The foreign subsidiaries were nonetheless required to bear the cost of insuring the products against damage or loss during the entire shipment (App., *infra*, 15a).

The insurance obtained for these shipments was "point to point": it covered the risk of damage or loss during transportation of the goods from the IBM facility in the United States to the point of foreign delivery. When IBM made the arrangements, the insurance was placed with a domestic insurer and the cost was billed to the foreign subsidiary. When the foreign subsidiary made the arrangements, the insurance was often placed with a foreign carrier, which the subsidiary paid directly. In both situations, IBM and its foreign subsidiary were listed as joint beneficiaries on the policies of insurance (App., *infra*, 15a-16a).

If damage occurred before the goods cleared customs—while IBM retained title to the goods and risk of loss—IBM received the insurance proceeds directly under these policies. If the loss occurred *after* the goods cleared customs—when title and risk of loss had passed to the importing foreign subsidiary—the insurance proceeds were paid to the subsidiary. In the latter event, the proceeds were used by the subsidiary to pay the full purchase price of the damaged products to IBM or, if IBM had already been paid, to reimburse the subsidiary for its loss (App., *infra*, 16a).

c. IBM filed federal excise tax returns for 1975 through 1984 but did not report any liability under Section 4371 of the Internal Revenue Code. On audit, the Internal Revenue Service determined that the premiums paid to foreign insurers were subject to the tax imposed by Section 4371 and that, pursuant to Section 4374, IBM was liable for the tax as a named beneficiary of the insurance policies.

The foreign subsidiaries reported to IBM that, during 1980, they had paid premiums of $2,065,137 to foreign insurers for "point to point" insurance for shipments of products that IBM manufactured in the United States. The tax applicable to those premiums under Section 4371 of the Code—calculated by multiplying the premiums by four percent—is $82,605. The parties stipulated that the foreign insurance premiums attributable to shipments of IBM products in each of the years 1975-1979 and 1981-1984 were the same as in 1980. The IRS therefore assessed the same amount of tax for each of those years under Section 4371 (App., *infra*, 18a).

2. IBM paid the resulting assessments and filed claims for refund. When those claims were denied, IBM commenced this refund suit in the Court of Federal Claims.

a. IBM contended that the tax imposed by Section 4371 of the Internal Revenue Code—as applied to insurance premiums for losses occurring during the shipment of goods from locations within the United States to purchasers abroad—violates the Export Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. IBM contended that the tax on insurance for export

shipments is a "Tax or Duty * * * laid on Articles exported" and is invalid under the specific holding of this Court in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915). In *Thames & Mersey*, the Court held a federal stamp tax on policies insuring marine risks unconstitutional as applied to shipments for export.

The United States contended that the analysis of *Thames & Mersey* is no longer valid. The government reasoned that subsequent decisions of the Court, such as *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), require the conclusion that the Export Clause does not invalidate a generally applicable, nondiscriminatory tax that does not fall uniquely and discretely on articles of export or export transactions.

b. The Court of Federal Claims held that application of the tax imposed by Section 4371 to insurance premiums for goods in export transit violates the Export Clause because it "amounts to a tax on exports" (App., *infra*, 26a). The court reasoned that this conclusion follows from the precise holding of this Court's 1915 decision in *Thames & Mersey*, which stated (237 U.S. at 26):

> It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation.

The Court of Federal Claims emphasized that, under *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), lower courts "must adhere to the accepted practice of following Supreme Court precedent unless the Supreme Court

clearly states that it is overruling earlier cases and explains why it is doing so" (App., *infra*, 28a). The court found no clear evidence that *Thames & Mersey* has been overruled or that its analysis has been discarded by this Court. The court held that *Thames & Mersey* therefore remains authoritative and that it compels the conclusion that the tax imposed by Section 4371 is unconstitutional as applied in this case (*id.* at 29a).

The court acknowledged that this Court's more recent decisions under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* have upheld application of nondiscriminatory state taxes to goods and services involved in importation and exportation. The court concluded, however, that those decisions could be distinguished on their facts. The court explained that *Washington Stevedoring*—which upheld application of a state gross receipts tax to a stevedoring company that handled export and import shipments—concerned "stevedoring" rather than "insurance" and that "stevedoring is a service whose value is not necessarily tied to the value of the goods it serves" (App., *infra*, 29a). The court further stated that *Michelin Tire*—which upheld application of a state property tax to imported goods located within the borders of the State—is inapposite because "in *Michelin* the [imported goods] had left the import stream and were * * * thus outside the scope of the Import-Export Clause" (*ibid.*).

3. The court of appeals affirmed (App., *infra*, 1a-11a). The court noted (*id.* at 11a) that this Court has admonished the lower courts that (*Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. at 484)

> [i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

The court of appeals stated that it was therefore bound to follow *Thames & Mersey*, and hold the tax imposed by Section 4371 unconstitutional as applied in this case, unless subsequent decisions of this Court "clearly signaled" an intent to overrule that earlier decision (App., *infra*, 8a).

The court of appeals concluded that it was "not so sure" (App., *infra*, 8a) that *Washington Stevedoring* and *Michelin Tire* signaled the requisite clear intent of this Court to abandon the analysis of *Thames & Mersey*. The court of appeals did not dispute that, if an analysis "similar" to that applied under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* were applied under the Export Clause, the holding and reasoning of *Thames & Mersey* would be discredited (App., *infra*, 7a-8a). Instead, the court stated that it was not certain that a similar analysis would be applied because there is a difference in the language of the two Clauses that could require a different result: the Import-Export Clause bars States from laying "Imposts or Duties on Imports or Exports"; the Export Clause bars the United States from laying any "Tax or Duty * * * on Articles exported from any State." The court of appeals stated (*id.* at 9a-10a):

> Although the [Supreme] Court at first expressed the view that the "diversity in language" between the two clauses did not reflect any difference in

"the act which is prohibited," *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827), in both *Michelin* and *Washington Stevedoring* the Court has noted and attached significance to the difference between the narrow term "Imposts and Duties" * * * and the broader term "Tax" * * *. *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759.

Reasoning that a "tax" that might be permitted under the "narrow" language of the Import-Export Clause might nonetheless be invalid under the "broader" language of the Export Clause (App., *infra*, 10a), the court concluded that the recent Import-Export Clause decisions fail to provide the requisite clear guidance that would permit a lower court to "disregard[] a higher court decision that all agree is binding precedent if it is still valid" (*id.* at 10a-11a).[3] The court therefore held "that [its] duty is to follow *Thames & Mersey* and hold Section 4371 invalid as applied" (*id.* at 11a).

REASONS FOR GRANTING THE PETITION

The decision in this case holds a federal statute unconstitutional as applied to a significant, recurring set of commercial transactions. The court of appeals concluded that the federal tax on insurance premiums paid to a foreign insurer for risks that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1))—as applied to casualty insurance for shipments from within the United States to foreign countries—repesents a "Tax or Duty * * * laid on

[3] The court of appeals noted that the United States had conceded that, "if *Thames & Mersey* is still good law, the assessments at issue in this case are invalid" (App., *infra*, 6a).

Articles exported" (U.S. Const. Art. I, § 9, Cl. 5) and therefore violates the Export Clause of the Constitution. The court stated, in reaching that conclusion, that it was compelled to follow this Court's 1915 decision in *Thames & Mersey Marine Ins. Co.* v. *United States*, *supra*, even though the analysis of that decision has been placed in question by more recent decisions of this Court.

Only this Court has "the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. at 484. The Court has directed lower courts to "follow the case which directly controls" even when that case "appears to rest on reasons rejected in some other line of decisions" (*ibid.*). As the result, only this Court can determine whether the considerations that led it to uphold generally applicable, nondiscriminatory state taxes under the Import-Export Clause—in *Michelin Tire* and *Washington Stevedoring*—also require that the generally applicable, nondiscriminatory federal statute involved in this case be upheld under the Export Clause of the Constitution.

The question presented in this case is of substantial recurring importance. The proper scope of the Export Clause has significance not only for the tax imposed under Section 4371 but also for other nondiscriminatory federal taxes of general application. For example, Section 4461 imposes on all shippers a "tax on any port use" of 0.125 percent of the value of all commercial cargo loaded or unloaded in United States ports. See 26 U.S.C. 4461(a), (b) (Supp. V 1993), 4462(a)(1). Approximately 700 cases are currently pending in the United States Court of International Trade challenging the constitutionality

of that statute under the Export Clause. See *United States Shoe Corp.* v. *United States*, No. 94-11-00668 (Ct. Int. Trade).[4] The Federal Circuit has exclusive jurisdiction over any appeal from the decision in those cases. 28 U.S.C. 1295(a)(5).

The Federal Circuit is a court of nationwide jurisdiction. Since all taxpayers are entitled to pay a challenged tax and sue for a refund within the Federal Circuit, it is unlikely that other courts of appeals will have an opportunity to review this issue under Section 4371 or other affected statutes. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions that present issues of substantial importance. See, *e.g.*, *United States* v. *Hill*, 113 S. Ct. 941, 945 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Review by this Court of a decision of the Federal Circuit holding a statute of Congress unconstitutional is fully warranted.

1. The tax imposed by Section 4371 of the Internal Revenue Code is not specifically directed to nor directly "laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5). Instead, it applies to insurance premiums paid to foreign insurers for any casualty risk that is "wholly or partly within the United States" (26

[4] Similar litigation is also pending in the federal district court in Maryland. See *American Ass'n of Exporters and Importers, Inc.* v. *Bentsen*, No. L94-1839 (D. Md.). The United States has moved to dismiss that case on the grounds that exclusive jurisdiction over cases under Section 4461 lies in the Court of International Trade. See 28 U.S.C. 1581(a); 26 U.S.C. 4462(f)(2).

U.S.C. 4372(d)(1)). It thus applies without discrimination to "wholly" domestic transactions as well as to risks that are only "partly" within the United States. As the House Ways and Means Committee observed when the statute was enacted in 1942, Section 4371 is designed to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, *supra*, at 61.

As a generally applicable, nondiscriminatory tax that is not discretely and exclusively imposed on "Articles exported," the tax imposed under Section 4371 is constitutional. It violates neither the text nor the object of the Export Clause and is validated by the recent decisions of this Court. In particular, in *Michelin Tire*, the Court "initiated a different approach to Import-Export Clause cases" that upholds generally applicable taxes that reach "services provided * * * to imports, exports, and other goods" without discrimination. *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. at 752, 761. The analysis of *Michelin Tire* and *Washington Stevedoring* applies equally to challenges to federal taxes under the Export Clause and, under that analysis, the tax imposed by Section 4371 should be sustained.

2. a. *The Export and Import-Export Clauses Are Complementary in Scope.* In this Court's first case under either the Import-Export or the Export Clause, Chief Justice Marshall observed of the two Clauses that "[t]here is some diversity in language, but none is perceived in the act which is prohibited." *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827). That observation has been repeated by this

Court on numerous occasions.[5] In the more numerous cases under the Import-Export Clause and the less numerous cases under the Export Clause, the Court has routinely cited cases under the two Clauses without differentiation. Moreover, the analysis applied in opinions under the two Clauses has not varied.[6]

b. *The "Original Package" Doctrine Under the Import-Export Clause.* In *Brown* v. *Maryland*, a Maryland statute required that importers or wholesalers of foreign articles or commodities purchase a license costing $50 to sell such goods. 25 U.S. (12 Wheat.) at 436. Brown was convicted of having imported and sold a package of foreign dry goods without having obtained a license. In holding that the statute violated the Import-Export Clause, the Court explained that a tax on the privilege of sale was, in substance, a duty upon things imported for sale. *Id.* at 439. Rejecting the suggestion that this would mean that imported goods would be perpetually immune from taxation, the Court stated that an import retains its "distinctive character" only while in the "original form or package in which it was imported" (*id.* at 442).

[5] See, *e.g.*, *Turpin* v. *Burgess*, 117 U.S. 504, 506-507 (1886); *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904); *United States* v. *Hvoslef*, 237 U.S. 1, 14 (1915); *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 67 n.5 (1974).

[6] The suggestion of the court of appeals that the language of the Export Clause may be "broader" in its prohibitive scope than the language of the Import-Export Clause (App., *infra*, 10a) does not withstand analysis. The entire text of the two Clauses must be considered. The Import-Export Clause precludes States from imposing "Imposts or Duties on Imports or Exports"; the Export Clause specifies that no federal "Tax or Duty shall be laid on Articles exported." U.S. Const. Art. I, § 10, Cl. 2; Art. I, § 9, Cl. 5. An "impost" on an "export" *is* a "tax" on an "Article exported"; a "tax" on an "Article exported" *is* an "impost." Under the text of the two Clauses, it is the charge collected on the item exported that is at issue. A "tax" that is not "laid on" "Articles exported" does not fall within the scope of the Export Clause. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. at 293-294; pages 23-24, *infra*.

In the *License Cases*, 46 U.S. (5 How.) 504 (1847), Chief Justice Taney acknowledged that a tax directed at imports would be invalid and did not question the validity of the "original package" doctrine. But he concluded that a generally applicable, nondiscriminatory state property tax would not be unconstitutional merely because it also applied to imported goods (*id.* at 576):

> Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State.

In *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872), however, the Court reached a different conclusion, holding that a generally applicable California property tax could *not* be imposed upon a shipment of French champagne held in an importer's warehouse in the "original package" in which shipped. *Id.* at 35. In doing so, the Court neglected to consider the con-

trary conclusion of Chief Justice Taney in the *License Cases*, although his approval of the "original package" doctrine was cited by the Court. *Id.* at 33-34.[7]

c. *The Early Export Clause Cases.* The Export Clause was invoked in *Pace* v. *Burgess*, 92 U.S. 372 (1876), by a tobacco manufacturer who, in 1868, was subject to a federal excise tax on tobacco products. Although tobacco intended for export was exempt from the tax, the exemption was subject to the requirement that packages for export be identified by an affixed engraved stamp costing 25 cents. The manufacturer brought suit to recover the price of the exemption stamps, claiming that they constituted a prohibited tax on exports. The Court denied recovery, explaining that the exemption stamps were designed to prevent fraud and did not represent a tax. *Id.* at 375.

In 1882, however, Congress discontinued the charge for the exemption stamp in a statute that referred to the stamp as an "export tax." Act of Aug. 8, 1882, ch. 468, 22 Stat. 372. On that basis, another tobacco manufacturer sued to recover the amounts he had paid for exemption stamps before the charge was discontinued. The Court adhered to its decision in *Pace* v. *Burgess*, but with a somewhat different rationale. In describing the Export and Import-

[7] The so-called "original package" rule was also followed in *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878), *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218 (1933), and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945). See also *May* v. *New Orleans*, 178 U.S. 496 (1900), and *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959).

Export Clauses, the Court stated (*Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886) (emphasis added)):

> The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. * * * But *a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition.*

Relying upon the above passage, the Court subsequently held that a manufacturer of cheese for export could not—merely from the fact that the cheese was intended for export—escape liability for the federal tax of one cent per pound upon that product. *Cornell* v. *Coyne*, 192 U.S. 418, 428 (1904). The Court explained that the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated" (*id.* at 427).

d. *The Decision in Thames & Mersey.* The direct ancestor of *Thames & Mersey* was *Fairbank* v. *United States*, 181 U.S. 283 (1901). That case involved a provision of the War Revenue Act of 1898 that imposed a variety of stamp taxes on written instruments, including "bills of lading * * * for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place" (ch. 448, § 26, 30 Stat. 459). In *Fairbank*, the Court held that the stamp tax on bills of lading for exported goods violated the Export Clause. Invoking a prior, similar holding under the Import-Export Clause (*Almy* v. *California*, 65 U.S. (24 How.) 169 (1861)), the Court held that the tax upon the bill of

lading was invalid because it was equivalent to a tax upon the exported articles themselves.

Two cases argued on the same day are the cases upon which IBM relies. Like *Fairbank*, they involved taxes imposed by the War Revenue Act of 1898. Unlike *Fairbank*, however, neither tax was imposed expressly or directly on export transactions. *United States* v. *Hvoslef*, 237 U.S. 1 (1915), involved a federal stamp tax upon any "Contract or agreement for the charter of any ship" (§ 26, 30 Stat. 460). *Thames & Mersey*, on which IBM most directly relies, involved a federal stamp tax on policies of marine insurance "whether against peril by sea or on inland waters" (§ 26, 30 Stat. 461). Since these statutes did not differentiate between domestic voyages and shipments to foreign ports, it might have been supposed that they would be sustained as general taxes of neutral application under the reasoning of *Turpin* v. *Burgess* and *Cornell* v. *Coyne*. See page 19, *supra*.

In *Hvoslef*, however, the Court instead invoked *Fairbank* without acknowledging that the stamp tax challenged in *Hvoslef*, unlike the tax challenged in *Fairbank*, was of general, not limited, application. In support of its decision in *Hvoslef*, the Court also invoked *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887). *Robbins* was the first of "a long line of 'drummer' cases" under the Commerce Clause, in which the Court held that a State could not impose a licensing fee on a person who solicited orders for goods to be shipped from another State.[8] The Court stated in *Robbins* (*id.* at 497):

[8] See *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 392 (1952). *Robbins* had a numerous progeny. See, *e.g.*, *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891); *DiSanto* v. *Pennsylvania*, 273 U.S. 34 (1927); *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946). Among the more recent was *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which this Court overruled in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). See page 25, *infra*. These decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause. Although the Commerce Clause is a limitation on the powers of the States, it *confers* powers on the United States. See page 29, *infra*.

> It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

Having applied *Fairbanks* and *Robbins* to immunize export transactions from broadly applicable taxing provisions in *Hvoslef*, the Court entered its decision in *Thames & Mersey* two weeks later on the authority of *Hvoslef*. 237 U.S. at 27.

The decisions in *Hvoslef* and *Thames & Mersey* established a pattern that this Court subsequently followed of immunizing export transactions from generally applicable federal taxes. For example, when Congress imposed a general tax on various sporting goods under the War Revenue Act of 1917, ch. 63, § 600(f), 40 Stat. 316-317, the Court invoked *Hvoslef* and *Thames & Mersey* to hold that the Export Clause prohibited imposition of the tax to a shipment of baseballs and bats to a purchaser in Venezuela. *A.G.*

Spalding & Bros. v. *Edwards*, 262 U.S. 66 (1923). See also *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292 (1917) (same under Import-Export Clause). Similarly, in *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), the Court held that gross receipts or sales taxes could not be imposed upon payments for loading or unloading ship cargoes transported in interstate or foreign commerce.

e. *The Modern Doctrine.* Toward the end of this period of decisions, there were indications of reconsideration. For example, in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254-255 (1938), the Court heavily qualified, if it did not contradict, the broad rationale of *Robbins* on which *Hvoslef* was based. And, in *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951), the Court indicated a revised view of the proper treatment of taxes upon transactions related or collateral to importation and exportation when it wrote (*id.* at 514-515):

> The difference [between this case and cases such as *Spalding*] is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. * * * [W]hen the tax is on activities connected with the export or import the range of immunity cannot be so wide.

Full reconsideration finally came in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). See also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984). Those decisions expressly overruled many

of the decisions previously discussed and, without cataloging them in detail, rejected other decisions that had disposed of the same issues in the same fashion.

(i) *Michelin Tire* involved the constitutionality of a state property tax as applied to imported tires held in the importer's warehouse in Georgia. Invoking the "original package" doctrine applied in *Low* v. *Austin*, the importer maintained that its imported tires were exempt from state tax. The Court rejected that claim, holding that (423 U.S. at 279)

> Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires is not within the constitutional prohibition against laying "any Imposts or Duties on Imports * * *", and * * * insofar as *Low* v. *Austin*, 13 Wall. 29 (1872) is to the contrary, that decision is overruled.

In reaching that decision, the Court reviewed the text and object of the Import-Export Clause, as well as its historical origin. 423 U.S. at 283-284. The Court noted that the considerations that gave rise to the Clause were that: (i) the federal government must speak with one voice in regulating commercial relations with foreign governments, and state tariffs on exports and imports could conflict with that requirement; (ii) import revenues were to be the major source of revenue to the federal government and should not be diverted to the States; and (iii) harmony among the States would be disrupted if the seaboard States could tax goods passing through their harbors to or from their inland neighbors. *Id.* at 285. The Court observed that nondiscriminatory property taxes interfere with none of the constitu-

tional concerns of the Import-Export Clause. *Id.* at 286-290.

Addressing the specific text of the Import-Export Clause in *Michelin Tire*, the Court "decline[d] to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" (423 U.S. at 293-294). The Court explained that the "original package" language of *Brown* v. *Maryland* had been misunderstood (*id.* at 298):

> [I]t is clear that the Court's view in *Brown* [v. *Maryland*] was that merely because certain actions taken by the importer on his imported goods would so mingle them with the common property within the State as to "lose their distinctive character as imports" and render them subject to the taxing power of the State, did not mean that in the absence of such action, no exaction could be imposed on the goods. Rather, the Court clearly implied that the prohibition would not apply to a state tax that treated imported goods in their original packages no differently from the "common mass of property in the country"; that is, treated it in a manner that did not depend on the foreign origins of the goods.

The Court further noted that the opinion in *Low* v. *Austin* had misread Chief Justice Taney's opinion in the *License Cases* which "makes crystal clear that the prohibition applied only to state exactions upon imports *as imports* and did not apply to nondiscriminatory ad valorem property taxes." 423 U.S. at 300. See pages 16-17, *supra*.

(ii) In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Court held that the Commerce

Clause does not bar application of a generally applicable state tax to the gross revenues of a company engaged exclusively in the transportation of motor vehicles in interstate commerce. The Court reconsidered and overruled its decision in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which, following *Robbins*, had held that Connecticut could not impose a tax for the privilege of engaging in interstate commerce. See page 20 & note 8, *supra*. The Court noted in *Complete Auto* that it was unquestioned that the activity engaged in by the taxpayer was sufficiently connected to the State to justify a tax, that the tax was fairly related to the benefit provided to the taxpayer, that the tax did not discriminate against interstate commerce, and that the tax was not unfairly apportioned. 430 U.S. at 287. Under those circumstances, the Court concluded that "the *Spector* rule does not address the problems with which the Commerce Clause is concerned" and overruled that decision. *Id.* at 288. The Court's holding in *Complete Auto* necessarily, albeit implicitly, overruled *Robbins* and the "long line of 'drummer' cases" that that decision had spawned. See note 8, *supra*.

(iii) In *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), the Court considered the State of Washington's renewed attempt to apply its gross receipts tax to the proceeds generated from loading and unloading ocean-going vessels. In the earlier decisions in *Puget Sound* and *Carter & Weekes*, the Court had invoked the Commerce Clause to hold unconstitutional the application of the State's tax to the proceeds of stevedoring cargoes in interstate and foreign commerce. See page 22, *supra*. In

Washington Stevedoring, however, the Court had little difficulty, after *Complete Auto*, in overruling those decisions insofar as the Commerce Clause was involved. 435 U.S. at 743-751.

The Import-Export Clause required separate consideration. *Michelin Tire* had inquired whether a generally applicable tax that does not favor or disfavor imports or exports conflicts with any of the policies leading to the adoption of the Import-Export Clause and had upheld the application of the property tax to imported goods, whether or not in the original package, when it found no friction or inconsistency. A similar inquiry led the Court to conclude in *Washington Stevedoring* that the generally applicable Washington tax on gross receipts from stevedoring offended none of the policies of the Import-Export Clause. 435 U.S. at 754-755. The Court specifically rejected the suggestion that the fact that *Michelin Tire* dealt only with goods no longer in transit required that the cases be differentiated. *Id.* at 755-757. The Court noted that *Canton Railroad* demonstrated that the analysis that prevailed in *Michelin Tire* was not to be discarded simply because the goods were in transit. *Ibid.* Moreover, the fact that *Michelin Tire* involved only imports while the Washington tax related to proceeds from stevedoring exports as well did not call for a different conclusion. *Id.* at 757-758. The Court concluded that the considerations that led to the decision in *Michelin Tire* were equally applicable to the Washington tax. *Ibid.*[9]

[9] Justice Powell concurred separately in *Washington Stevedoring*. He concluded that the controlling factor in that case, as in *Michelin Tire*, is that local taxpayers should not be required to subsidize the services used and enjoyed by importers and exporters; instead, the consumers of such goods should pay for the services rendered by government just as they paid transportation costs. 435 U.S. at 761-764.

(iv) In *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), the Court made clear that more than just a few named decisions had been overruled by *Michelin Tire* and *Washington Stevedoring*. Instead, in overruling an earlier decision that had invalidated the application of a "nondiscriminatory ad valorem personal property tax to imported fibers still in their original packages" (*id.* at 354), the Court emphasized that the reasoning that underlay those earlier decisions had been "*repudiated*" (*id.* at 362). The fact that the Court in *Michelin Tire* did not explicitly name all of the cases whose reasoning had been rejected does not indicate that those older decisions retain "current validity." *Id.* at 361.

f. *Application of the Modern Doctrine to the Export Clause.* There is no reason why the more recent decisions of this Court should not be authoritative with respect to the Export Clause, and every reason why they should be. As we have noted, beginning with *Brown* v. *Maryland* and periodically since then, the Court has stated that the two Clauses have the same scope. Moreover, cases under the two Clauses have been cited by the Court without differentiation. Most recently, in *Washington Stevedoring*, the Court cited *Spalding* (an Export Clause case) along with cases involving state taxes and the Import-Export Clause to illustrate reasoning that was no longer approved. 435 U.S. at 752.

As this Court explained in *Washington Stevedoring*, the Court in *Michelin Tire* "surveyed the

history and purposes of the Import-Export Clause to determine, for the first time, which taxes fell within the absolute ban on 'Imposts and Duties'" (435 U.S. at 751). The Court concluded from this examination that a generally applicable tax that merely falls, without discrimination, on imports and exports as well as other goods, does not violate the Import-Export Clause. 423 U.S. at 302.

An examination of the history and objectives of the Export Clause similarly demonstrates that the generally applicable, nondiscriminatory tax imposed by Section 4371 of the Internal Revenue Code does not violate that Clause. As the court of appeals noted (App., *infra*, 4a), the Export Clause reflected the fear of the agricultural and exporting southern States that the more populous and numerous northern States would impose discriminatory taxes on the export of their products. The debate is well described in Charles Warren's classic *The Making of the Constitution* 570-574 (reprint 1993) (1928).[10] See also

[10] The central portion of Warren's description is as follows (at 571-572) (footnote omitted):

> The question of a prohibition of taxes and duties on exports now brought these sectional differences into an outbreak in the Convention.
>
> It is to be noted, as a preliminary to consideration of this clash, that the Committee's proposal to forbid export duties was a very radical departure from the theory and practice theretofore prevailing in governmental taxation. As has been well said: "To attempt to organize a Government without the power to tax exports was an innovation. From time immemorial, every nation had taxed whatever productions of its soil its inhabitants might presume to export. In the old economy, its maxim was to tax exports but to admit imports free." The prohibition of export duty

App., *infra*, 4a; Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 305-308, 359-363, 441-442 (1966) (proceedings of August 16, 21, 28, 1787).

It is beyond question that the tax imposed by Section 4371 is generally applicable and discriminates against no region or product. It applies equally to fire, storm, flood, and earthquake insurance, and to insurance against damage or loss for shipments from, for example, San Francisco to Alaska, Hawaii, or Guam, or from New York to Miami or Galveston, as it does to insurance covering IBM's shipments to its foreign subsidiaries or their customers. Moreover, the United States—like the States—assists and protects IBM's shipments over highways within the United States (financed in substantial part by the federal government) as well as in the movement of such goods by sea or air beyond our borders.

It must also be recognized that the Commerce Clause gives Congress comprehensive authority over exports and imports. It was established early that Congress had the power to embargo or otherwise control the export of such goods or materials as it chose. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 191-192

> now inserted in the new Constitution was not based, however, on any change in economic theory but on purely political and sectional conditions. The South, being agricultural and having three great crops which grew nowhere else,—tobacco, rice, and indigo,—feared that the possession of this power by Congress would enable the North to discriminate against it, by a tax which would operate only on the peculiarly Southern articles of export. This fear had been expressed early in the Convention.

(1824); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 566-567 (1850); *United States* v. *The William*, 28 Fed. Cas. 614, 620-623 (D. Mass. 1808) (No. 16,700). It is, of course, well established that the taxing power may be employed in the regulation of foreign commerce. *Board of Trustees* v. *United States*, 289 U.S. 48, 57, 58 (1933). The Export Clause removes only a small and narrowly defined area from this far-ranging authority.

Considering the origins of the Export Clause, and this Court's more recent decisions, the prohibitions of that Clause should be confined to taxes directly and exclusively assessed upon, and discriminating against, "Articles exported." The federal statute that the court of appeals held unconstitutional in this case does not violate that standard.

3. The statute that the court of appeals invalidated cannot effectively be enforced without this Court's further review. Under the decision in this case, any taxpayer who obtains foreign insurance for export shipments may pay an assessment under Section 4371 and obtain a refund by bringing suit within the Federal Circuit. See page 14, *supra*. Congress enacted the tax imposed by Section 4371 to raise "an appreciable amount of revenue" and to "eliminate an unwarranted competitive advantage" for foreign insurers who do not pay federal income taxes. H.R. Rep. No. 2333, *supra*, at 61. Absent review by this Court, these statutory objectives will plainly be defeated. And, as the court of appeals recognized (App., *infra*, 11a), it is uniquely the responsibility of this Court to complete the task of eliminating inconsistency in its own jurisprudence in this area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5164

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Appealed from: U.S. Court of Federal Claims

DECIDED: July 10, 1995

Before: ARCHER, *Chief Judge*, PLAGER and BRYSON, *Circuit Judges.*

BRYSON, *Circuit Judge.*

This case raises a question concerning the constitutionality of a federal statute. The government, as appellant, acknowledges that a 1915 Supreme Court decision is directly on point and that, if the decision is still good law, the statute at issue must be held unconstitutional as applied. The government argues, however, that the 1915 decision has been undermined by subsequent Supreme Court authority, and it asks us to regard that case as no longer binding. We do not regard it as clear that the

Supreme Court's more recent decisions have repudiated the 1915 decision. We therefore affirm the decision of the Court of Federal Claims invalidating the taxes at issue in this case.

I

During the pertinent tax years, 1975 through 1984, International Business Machines Corporation (IBM) sold information processing systems and related products to domestic and foreign customers. With respect to many of its foreign sales, IBM manufactured products in the United States, sold them to its foreign subsidiaries, and shipped them either directly to the foreign customers or to consolidation centers in the customers' countries. The products were shipped by common carrier from IBM's domestic manufacturing plants to domestic ports or airports, where they were loaded onto ships or airplanes. Upon arrival in the foreign country, the products were cleared through customs and shipped to the foreign customers or consolidation centers. Title to the products passed from IBM to its foreign subsidiaries when the goods cleared customs in the foreign countries. In some cases, IBM's foreign subsidiaries purchased insurance from foreign insurers for the products during their shipment; in those cases, both IBM and the foreign subsidiaries were listed as insured beneficiaries.

The Internal Revenue Service audited IBM's federal excise tax returns for 1975 through 1984 and determined that, as a beneficiary, IBM was subject to a four percent excise tax on the premiums paid to foreign insurers. The excise tax was assessed under the authority of 26 U.S.C. § 4371, which imposes a four percent tax on each policy of casualty insurance issued by a foreign insurer to a domestic entity for risks or liabilities wholly or partly within the United States. Section 4371 applies only to insurance obtained from foreign insurers who are not subject to

federal income tax; it was designed to offset the advantage that such insurers would otherwise have over domestic insurance companies that are subject to domestic income taxes. *See* H.R. Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942).

IBM paid the assessed excise taxes and filed suit in the Court of Federal Claims, seeking a full refund of the taxes paid. In a thorough opinion on which we rely, the Court of Federal Claims held that the excise tax on premiums charged by foreign insurers, as applied to casualty insurance on goods in the export stream, was in effect a tax upon the exported products themselves and thus ran afoul of the Export Clause of the Constitution, Article I, Section 9, Clause 5. *International Business Machines Corp.* v. *United States*, 31 Fed. Cl. 500 (1994). In so holding, the court relied on the Supreme Court's decision in *Thames & Mersey Marine Insurance Co.* v. *United States*, 237 U.S. 19 (1915), which struck down a similar tax on marine insurance policies.

The Court of Federal Claims rejected the government's argument that the analysis in the *Thames & Mersey* case has been repudiated in subsequent Supreme Court decisions, and that the excise tax imposed on foreign insurance policies should be upheld as a permissible tax of general application that does not discriminate against exports. Instead, the court concluded that casualty insurance is an integral part of commercial exportation, that the value of exported goods bears a close relationship to the value of insurance policies on those goods, and that the tax imposed in this case therefore amounted to a tax on exports, prohibited by the Export Clause.

II

This case presents the question whether the Supreme Court analysis of the Export Clause in the *Thames & Mersey* case retains its vitality in the wake of subsequent Supreme Court decisions

involving the Import-Export Clause, Article I, Section 10, Clause 2, in which the Court has modified its approach to issues arising under that Clause.

A

The Export Clause provides, in one sentence: "No Tax or Duty shall be laid on Articles exported from any State." Along with the Import-Export Clause, which prohibits any State, without the consent of Congress, from laying "any Imposts or Duties on Imports or Exports," the Export Clause was "one of the compromises which entered into and made possible the adoption of the Constitution." *Fairbank* v. *United States*, 181 U.S. 283 (1901).

At the Constitutional Convention, strong sentiments were voiced on the subject of export taxes. Representatives of the Southern States expressed concern that a Congress controlled by the more numerous and populous Northern States would impose burdensome levies on Southern exports. Charles Pinckney of South Carolina insisted that security against taxes on exports be included in the Constitution, on a par with security against the emancipation of the slaves. 2 *The Records of the Federal Convention of 1787* 95 (Max Farrand ed. 1927). According to Madison's notes, George Mason of Virginia likewise "urged the necessity of connecting with the power of levying taxes duties &c, . . . that no tax should be laid on exports. . . . He hoped the [Northern] States did not mean to deny the Southern this security." *Id.* at 305. Concern over the risk of abuse of the power to tax exports was expressed even by a Northern delegate, Elbridge Gerry of Massachusetts, who stated his view that "the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it." *Id.* at 307.

Acknowledging the importance of the Export Clause and its flat prohibitory language, the Supreme Court has consistently given the Clause a broad construction. In one of the first major decisions applying the Export Clause, the Court struck down a stamp tax imposed on bills of lading relating to goods designated for foreign export. Such a tax, the Court explained, "is in substance and effect equivalent to a tax on the articles included in that bill of lading, and, therefore, a tax or duty on exports, and in conflict with the constitutional prohibition." *Fairbanks* v. *United States*, 181 U.S. at 312.

In applying that test, the Court distinguished between taxes imposed on property prior to its entering the export stream and taxes imposed, directly or indirectly, on property during the export process. For example, in *Cornell* v. *Coyne*, 192 U.S. 418 (1904), the Court upheld a tax on filled cheese that was imposed prior to its exportation, holding that a nondiscriminatory tax on manufactured cheese was not unconstitutional simply because the manufacturer intended from the outset to export the cheese. By contrast, in *United States* v. *Hvoslef*, 237 U.S. 1 (1915), the Court struck down a tax imposed on charter parties for the carriage of cargo to foregin ports. As applied to the charter parties for export at issue in the case before it, the Court held that the tax was "nothing else than a tax on exportation" and thus prohibited by the Export Clause. *Id.* at 18. It did not matter, the Court held, that the statute in question was not limited to charter parties for exports, but applied to charter parties generally; even if the statute in question created a nondiscriminatory tax or general application, it was unconstitutional to the extent that it was applied to charter parties for export, because in so doing, it had the prohibited effect of imposing a tax on exports. *Id.*

Two weeks after *Hvoslef*, the Supreme Court in the *Thames & Mersey* case struck down a stamp tax

on policies of marine insurance to the extent that it applied to policies insuring exports. The Court put the question as whether "the tax upon such policies [is] so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition." 237 U.S. at 25. Finding that marine insurance "is by virtue of the demands of commerce an integral part of the exportation," *id.* at 26, the Court concluded that the tax at issue, as a practical matter, fell upon the exporting process and therefore was invlaid under the Export Clause.

B

The government concedes that if *Thames & Mersey* is still good law, the assessments at issue in this case are invalid. In the government's view, however, subsequent decisions construing the Import-Export Clause have rendered *Thames & Mersey* analytically unsound. The government contends that the Export Clause should be interpreted not to outlaw taxes of general application, as long as they do not discriminate against exported goods or services relating to exports. The government therefore invites this court to disregard the Supreme Court's contrary analysis of the Export Clause in *Thames & Mersey*.

In pressing its case against *Thames & Mersey*, the government relies particularly on two decisions construing the Import-Export Clause, *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978). Prior to the *Michelin* decision, the Supreme Court viewed the Import-Export Clause as erecting a general prohibition against state taxation of imports and exports. The focus of inquiry was on whether the impact of the tax fell on goods that were in foreign commerce; if it did, the tax was forbidden (except in the limited

circumstances permitted by the Clause itself). *See Almy* v. *California*, 65 U.S. (24 How.) 169 (1861); *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872).

In the *Michelin* case, the Court jettisoned that mode of analysis and adopted a new approach based on the text and purposes of the Import-Export Clause. Overruling its prior decision in *Low* v. *Austin*, the Court held that a nondiscriminatory ad valorem property tax does not run afould of the Import-Export Clause simply because it is applied to goods that have recently been imported. The Court noted that the Import-Export Clause bans only "Imports or Duties"; it "is not written in terms of a broad prohibition of every 'tax.'" *Michelin*, 423 U.S. at 290. Moreover, the Court explained that the Framers adopted the Import-Export Clause to ensure that the federal government would speak with one voice in regulating commerce with foreign nations, to preserve import revenues for the federal government, and to protect states without port facilities from exploitation by those directly engaged in foreign commerce. None of those concerns, the Court stated, is triggered by a nondiscriminatory ad valorem tax "which is also imposed on goods that are no longer in import transit." 423 U.S. at 286.

The Supreme Court used similar reasoning to reach a similar result two years later in the *Washington Stevedoring* case. In that case, which involved an Import-Export Clause challenge to a state tax on stevedoring services, the Court rejected an argument that the tax was impermissible when applied to stevedoring services relating to foreign imports and exports. A nondiscriminatory tax on stevedoring services was not an "import or duty" on imports or exports, the Court concluded, but simply a local tax on services that happened to facilitate the importation and exportation of goods.

Relying on *Michelin* and *Washington Stevedoring*, the government argues that Section 4371

should be upheld as a nondiscriminatory tax that does not specifically target exports and therefore is not an invalid "tax or duty" laid "on articles exported from any State." Although *Michelin* and *Washington Stevedoring* arose under the Import-Export Clause, rather than the Export Clause, the government argues that the Supreme Court is likely to follow a similar analysis under the Export Clause when the occasion arises.

The government finds additional support for its position in cases decided under the Commerce Clause. As under the Import-Export Clause, early Commerce Clause cases struck down even nondiscriminatory taxes on the privilege of doing business in a state when applied to an activity that was part of interstate commerce. *See, e.g., Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951); *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1987). That line of cases, however, was overturned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), in which the Court held that the Commerce Clause is not violated by the application of a fairly apportioned and nondiscriminatory tax on the privilege of doing business in a state, even if the tax is applied to an interstate activity.

The government points out that in *Hvoslef* (and by extension in *Thames & Mersey*, which relied on *Hvoslef*) the Court invoked the line of Commerce Clause authority that was disapproved in *Complete Auto*. The government also points out that the Court's analysis of the Export Clause in *Thames & Mersey* paralleled the Court's then-governing approach to the Import-Export Clause, which has also been disapproved. Accordingly, the government submits, the analytical foundations of *Thames & Mersey* have been removed, and its demise is a foregone conclusion.

We are not so sure. While the Supreme Court may at some point reconsider *Thames & Mersey*, it has

not clearly signaled that it is ready to do so. Support for the continuing vitality of *Thames & Mersey* can be found both in the Court's Import-Export Clause decisions and in the distinctions in language and policy betewen the Import-Export Clause and the Export Clause.

In *Canton Railroad Co.* v. *Rogan*, 340 U.S. 511 (1951), a predecessor of the *Washington Stevedoring* case, the Supreme Court upheld state taxes on transportation services as applied to goods being imported or exported. The Court was careful to distinguish *Thames & Mersey*, noting that the tax on marine insurance policies addressed in *Thames & Mersey* was "the equivalent of a direct tax on the articles." 340 U.S. at 513-14. And in *Washington Stevedoring*, the Court recognized that the tax on insurance policies in *Thames & Mersey* was on an "activity so connected with the goods that the levy amounted to a tax on the goods themselves." 435 U.S. at 756 n.21. Although the *Washington Stevedoring* Court acknowledged that "the basis for distinguishing *Thames & Mersey* is less clear" than for other similar cases (because marine insurance policies arguably have a value apart from the value of the insured goods), the Court noneless noted that "the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* Thus, while the Court's treatment of *Thames & Mersey* may reflect less than a ringing endorsement of that decision, the Court's characterization of *Thames & Mersey* as distinguishable from, rather than in tension with, the *Canton Railroad* and *Washington Stevedoring* cases significantly undermines the government's contention that *Thames & Mersey* must be regarded as a dead letter.

The Supreme Court has also pointed to the difference in language between the Import-Export Clause and the Export Clause. Although the Court at

first expressed the view that the "diversity in language" between the two clauses did not reflect any difference in "the act which is prohibited," *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827), in both *Michelin* and *Washington Stevedoring* the Court has noted and attached significance to the difference between the narrow term "Imposts and Duties" (the language of the Import-Export Clause) and the broader term "Tax" (the language of the Export Clause). *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759.

The Court has suggested that a difference in policy underlies the difference in language. While the Import-Export Clause was intended to prohibit States from imposing a "transit fee" on goods moving in foreign commerce, *Washington Stevedoring*, 435 U.S. at 764 (Powell, J., concurring in part and concurring in the result), the Export Clause served the broader purpose of "forbid[ding] federal taxation of exports." *Washington Stevedoring*, 435 U.S. at 758. The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction.

III

Urging us to anticipate the overruling of *Thames & Mersey*, able counsel for appellant has called our attention to the opinion of Judge Learned Hand, dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (2d Cir. 1943). In his opinion in that case, Judge Hand explained that a lower court should not feel obliged to follow a higher court decision "in the face of changes plainly foreshadowed," simply because the higher court decision has not yet been explicitly overruled. While that proposition may be sound in extreme cases, we do not agree with counsel that it applies to this case. Here, unlike in the case

Judge Hand put, we do not believe the change the government anticipates is "plainly foreshadowed."

Although the Supreme Court may yet reconsider the *Thames & Mersey* decision, and with it the Court's traditional analysis of the Export Clause, we do not feel free in this case to take the extraordinary step of disregarding a higher court decision that all agree is binding precedent if it is still valid. Thus, the precedent that seems to us most pertinent is not Judge Hand's dissent in the *Spector Motor* case, but the Supreme Court's own more recent directive to inferior courts, in *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989):

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

In light of that instruction, and the undisputed applicability of *Thames & Mersey* to the tax imposed in this case, we conclude that our duty is to follow *Thames & Mersey* and hold Section 4371 invlaid as applied.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 388-89T

(Filed: June 23, 1994)

INTERNATIONAL BUSINESS MACHINES CORPORATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Taxation: Excise Tax on Foreign Insurers; Export Clause (Art. I, § 9, cl. 5)

OPINION

LYDON, Senior Judge:

In this litigation, International Business Machines Corporation (IBM) seeks to recover deficiencies assessed by the Internal Revenue Service after the Service determined that IBM failed to pay a four percent excise tax on premiums paid to foreign insurers that issued policies covering products IBM sold to its foreign subsidiaries. No facts are in dispute, and each party has moved for summary judgment. The issue presented in the summary judgment motions is whether the excise tax on foreign insurance premiums violates the constitutional prohibition against taxing exports. Because the court agrees with IBM that the tax at issue

in this case is prohibited by the Constitution, the court grants summary judgment in favor of IBM.

I

Sales of IBM Products Outside the United States

The following facts have been stipulated by the parties or are otherwise undisputed. IBM is a domestic corporation incorporated under the laws of the State of New York, whose principal place of business is in Armonk, New York. IBM is a developer and manufacturer of sophisticated information processing systems and related products, sold throughout the world. During the tax years at issue in this case, 1975-84, sales of IBM products outside the United States were made through a worldwide network of more than one hundred wholly owned foreign subsidiary corporations. IBM products sold by foreign subsidiaries were manufactured either in their own overseas plants (or in the plants of other IBM foreign subsidiaries) or by IBM at manufacturing plants in the United States.

During the tax years in issue, IBM products manufactured in the United States and sold outside the United States through foreign subsidiaries included (but were not limited to) the following items, manufactured at the locations indicated:

Product:	Manufacturing Locations:
Mainframe computers	Poughkeepsie, NY
Tape drivers, large printers, magnetic tape	Tucson, AZ
Disc drives	San Jose, CA
Copiers, toner, supplies	Boulder, CO
Intermediate computers	Rochester, MN, Austin, TX

Personal computers, keyboards	Austin, TX, Boca Raton, FL
Point of sale banking machines, circuit cards	Charlotte, NC
Communication devices, cathode ray terminals	Raleigh, NC
Semiconductors	Manassas, VA, East Peekskill, NY, Burlington, NY
Large circuit boards, specialized intermediate computers	Endicott, NY

Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders. Depending upon the particular product, IBM would fill a subsidiary's order either by (1) building the product to particular specifications contained in a purchase order ("built to order"), or (2) utilizing ongoing production at a factory or inventory warehouse ("built to plan").

Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were destined for a United States airport (typically, John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the

Far East), but some shipments were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for two to five days, but could remain while awaiting space on an airliner for as long as thirty days. The products would be reloaded at the freight forwarders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, they were unloaded, cleared customs, and loaded on trucks for shipment to their final destination.

When foreign subsidiaries purchased IBM products from IBM during the years in issue, the terms of sale called for title to the products (and the risk of loss) to pass from IBM to the subsidiary when the goods cleared customs in the foreign country. The terms of sale also called for the purchasing subsidiary to bear the cost of insuring the products against damage or destruction during shipment.

Insurance Covering the Shipment of IBM Products Sold to Foreign Subsidiaries

All U.S.-manufactured products IBM sold to foreign subsidiaries were covered by casualty insurance against damage or destruction during shipment. Insurance was "point to point," that is, it covered the risk of loss to goods during transportation by surface or air transportation from the IBM facility in the United States until delivered to the foreign customer or a foreign consolidation center. In some cases, IBM arranged for the insurance; when it did so, insurance was placed with a U.S. insurance carrier, and the cost was billed to the foreign subsidiary. In other instances, the foreign subsidiary placed the insurance; when it did so, the insurance often was with a foreign carrier, which the subsidiary paid for directly. In all cases, both IBM

and its foreign subsidiary were listed as insured beneficiaries.

When a foreign subsidiary obtained its own insurance coverage with a foreign insurer, the policy covered not only shipments to it by IBM from the United States, but shipments of goods purchased from foreign affiliates in other countries as well. The insurer would charge a separate premium to cover each shipment, the amount of which was determined by multiplying the declared value of the particular shipment by the premium rate applicable to that shipment. The premium rate depended on such underwriting factors as the place of origin and destination of the goods, the type of goods involved and how they were packaged, the time and distance of the trip, the route and mode of transportation, and the amount of material handling expected during the trip.

If damage to an IBM product being shipped to a foreign country occurred while IBM had title to the goods (and the risk of loss), then IBM would be entitled to the insurance proceeds under the insurance policy (whether issued by a U.S. company or a foreign insurer). If the loss occurred, however, after the importing foreign subsidiary acquired title to the products, the insurance proceeds would be payable to the subsidiary. In the latter case, the subsidiary would use the proceeds to pay IBM the full purchase price of the damaged products, or to reimburse itself for the purchase price if IBM had already been paid. Since most IBM products shipped to foreign subsidiaries were packaged in containers, damage was frequently not discovered until after the products arrived at their destination. As a practical matter, it was often impossible to determine when a loss occurred and therefore who was legally entitled to receive the policy proceeds. In most cases involving foreign insurance carriers, therefore, the insurance company simply paid the insurance

proceeds to the foreign subsidiary which used the proceeds to pay IBM for the goods.

The Service's Position During the Audits

For the tax periods at issue in this litigation, each quarter during the years 1975 through 1984, IBM filed federal excise returns that did not report any liability under § 4371 of the Internal Revenue Code of 1954, a four percent excise tax on premiums paid for certain policies of insurance issued by foreign insurers. On audit, the Service determined that IBM was liable for the § 4371 tax as a result of the policies purchased from foreign insurance companies insofar as those policies applied to IBM products being exported from the United States.

As part of the audit process, IBM requested the Service's District Director to seek technical advice from the Service's National Office on whether the § 4371 tax as applied to IBM's exports was in violation of Article I, § 9, clause 5 of the United States Constitution, which will be referred to throughout this opinion as the Export Clause. In a Technical Advice Memorandum dated May 12, 1982, the National Office rejected IBM's constitutional argument on the grounds that the § 4371 tax was not a "tax" within the meaning of the Export Clause because the primary object of the tax statute was regulatory as opposed to revenue-raising.

On reconsideration, the Service issued a second Technical Advice Memorandum, dated November 6, 1984, reaffirming its earlier position and adding a second argument, that the Export Clause did not restrict application of the § 4371 tax because the incurred risks included some transportation within the United States. The Service found that the Export Clause had no application at all to an export voyage if some portion of the total voyage included an intra-U.S. transportation leg. Because the insurance policies in question here covered not just the

overseas portion of the export shipments but also the inland leg from the IBM manufacturing facilities to the U.S. air or sea port, the Service concluded that the Export Clause had no application to any of the shipments. Presently, the government is not relying on the positions advanced by the Service described above.

The Assessments

The Service determined that the premiums paid to foreign insurers with respect to U.S. manufactured IBM products sold to its foreign subsidiaries were subject to the tax imposed by § 4371. During the audit, IBM sent questionnaires to its foreign subsidiaries and determined that the premiums paid by them to foreign insurers during the year 1980, allocable to U.S.-manufactured IBM products sold outside the United States, totaled $2,065,137. For expediency in making assessments under § 4371, IBM and the Service agreed that the foreign insurance premiums attributable to such products in each of the years 1975-79 and 1981-84 were the same as the premiums paid in 1980. Accordingly, the Service assessed § 4371 taxes of $82,605 per year (a figure calculated by multiplying the annual premiums by four percent), along with interest and delinquency penalties for each quarter in issue. IBM paid its assessments in full, and timely filed claims for refund. The Service denied these claims on December 23, 1988. IBM timely filed its action in this court on July 11, 1989. Since then, the government has since abated the penalty assessments and refunded the amounts so assessed to IBM, with interest. The assessments for tax and interest, which are still in dispute, total $1,532,235.87.

The Present Motions

The sole question presented by the motions for summary judgment is whether § 4371 is constitutionally impermissible, given the facts agreed to by the parties. Article I, section 9, clause 5 of the United States Constitution, the Export Clause, provides: "No Tax or Duty shall be laid on Articles exported from any State." This provision was intended to free all exportations from the burdens of national taxation.

Section 4371 provides:

> There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by a foreign insurer or reinsurer, a tax at the following rates:
>
> (1) Casualty insurance and indemnity bonds.—4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);

The parties appear to agree that as the terms "foreign insurer," "policy of casualty insurance," and "insured" are defined in § 4372, the premiums on casualty insurance that IBM purchased are facially subject to the tax imposed by § 4371.

II

A. IBM's Argument

IBM directs the court's attention to *Thames & Mersey Marine Insurance, Co. v. United States*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821 (1915), cited for the holding that the Export Clause prohibits the levying of taxes on policies of marine insurance on exports.

In *Thames & Mersey*, the taxpayer sought to recover amounts it paid in stamp taxes on policies insuring exports against marine risks. In its analysis, the Court turned quickly to *United States v. Hvoslef*, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813 (1915), a case decided two weeks before *Thames & Mersey*. In *Hvoslef*, the Court invalidated a tax levied on charter parties which were exclusively for the carriage of cargo from state ports to foreign ports because the tax was essentially a tax on exports. The *Thames & Mersey* court said that its issue followed directly, for the question presented by both *Hvoslef* and *Thames & Mersey* was: "Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition?" *Thames & Mersey*, 237 U.S. at 25, 35 S.Ct. at 498. Put another way by the Court, the constitutionality of this tax depended on "whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself." *Id.* at 26, 35 S.Ct. at 498. Answering this question by examining "the exigencies of trade [to] determine what is essential to the process of exporting," the Court held that marine insurance policies are so vitally connected to the export process that a tax on the policies amounts to a tax on the exports themselves, in contravention of the Export Clause. *Cf. Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862 (1901) (stamp tax on bill of lading for exported goods is in effect a tax on the articles included in the bill of lading, and is therefore a tax on exports).

The second prong of IBM's contention is that as far as certain taxes are proscribed by the Export Clause of the Constitution, § 4371 is such a tax. IBM states that the predecessor of § 4371 was a stamp tax enacted as part of a comprehensive wartime revenue

bill, the Revenue Act of 1918. Ch. 18, § 1107, 40 Stat. 1057, 1138. The excise tax on foreign insurers was re-enacted as part of a World War II revenue bill, the Revenue Act of 1942. Ch. 619, § 502, 56 Stat. 798, 955. A House report discussing this revenue measure, cited by IBM, stated: "It is believed that the revised provision will yield an appreciable amount of revenue, and at the same time eliminate an unwarranted competitive advantage now favoring foreign insurers [who are not subject to income tax]." H.R.Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942).

Finally, IBM argues that export protection begins as soon as goods enter the "export stream," and accordingly the prohibition against taxation that burdens exports extends to the payment of taxes on premiums by IBM in this case. The "export stream" is the final, continuous journey out of the country, and tax immunity attaches as soon as the journey begins. *Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 752, 98 S.Ct. 1388, 1400, 55 L.Ed.2d 682 (1978). Referring again to *Thames & Mersey*, IBM argues that the payment of these taxes is so directly and closely related to the process of exporting that the tax is in substance a tax upon the exportation, and thus constitutionally prohibited. Section 4371, argues IBM, falls outside the spirit of the Supreme Court's thoughts in *Fairbank v. United States*, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862 (1901). There, the court stated:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden . . . . [I]t is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Id. at 292-93, 21 S.Ct. at 652.

B. The Government's Argument

As mentioned previously, the government is not presently advancing the two positions defended by the Service's National Office that it took on § 4371 during the audit process, namely, that § 4371 does not impose a tax that has any constitutional ramifications because its primary purpose is regulatory instead of revenue-raising, and that *Thames & Mersey* is distinguishable because these shipments were not pure exportation in that they included an inland leg from a plant inside the United States to a port.

In its cross-motion, the government does not disagree with the admonition in *Fairbank* that exports cannot be burdened by taxation that interferes with the export process. Where IBM goes astray, argues the government, is in its argument that *Thames & Mersey* controls this case. The government says that *Thames & Mersey* is silent on the question of whether the excise tax imposed by § 4371 targeted exports in a discriminatory fashion or whether the tax was facially neutral in this regard. The thrust of the government's motion for summary judgment is that *Thames & Mersey* has been superseded by Supreme Court decisions that have shifted the critical "Export Clause" question to whether a tax discriminates against exports in their capacity as exports.

The government's argument is premised on its interpretation of two related Supreme Court decisions. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), the State of Georgia assessed ad valorem property taxes against Michelin's inventory of imported tires and tubes. Michelin argued that the ad valorem tax was prohibited by the "Import-Export Clause" of the Constitution, Article I, § 10, clause 2, which provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for

executing its own inspection Laws. . . ." The Court rejected Michelin's proposition, stating: "Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property which is also imposed on imported goods that are no longer in transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.* at 286, 96 S.Ct. at 541.

Critical to the Court's holding in *Michelin* was its discussion of *Low v. Austin*, 80 U.S. (13 Wall.) 29, 20 L.Ed. 517 (1872). The Court characterized Low as "the leading decision of this Court holding that the States are prohibited by the Import-Export Clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports and become incorporated into the mass of property in the State." *Michelin*, 423 U.S. at 282, 96 S.Ct. at 539. Low, the Court continued, improperly expanded the prohibition of the Import- Export Clause, rejecting the more reasoned views expressed by Justice Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827), and Justice Taney in the *License Cases*, 46 U.S. (5 How.) 504, 12 L.Ed. 256 (1847), that an examination of the origins of the Clause "makes crystal clear that the prohibition applied only to state exactions upon imports as imports and did not apply to nondiscriminatory ad valorem property taxes." *Michelin*, 423 U.S. at 300, 96 S.Ct. at 547. Accordingly, the Court found that Low was wrongly decided and explicitly overruled it. *Id.* at 301, 96 S.Ct. at 548.

What in *Michelin* the Supreme Court said about the taxation of imports *qua* imports, it extended to the taxation of exports *qua* exports in *Washington Stevedoring*. There, the Court resumed a discussion it began in *Michelin*. The Court noted that "*Michelin* initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it

analyzed the nature of the tax to determine whether it was an 'Impost or Duty.'" *Washington Stevedoring*, 435 U.S. at 752, 98 S.Ct. at 1400. The import tax in *Michelin* was upheld because it did not offend the three main concerns of the Framers of the Import-Export Clause: the government speaking with one voice when regulating commercial relations with foreign governments; preventing federal sources of import revenues from being diverted to the states; and preventing states from levying taxes on citizens of other states by taxing goods merely flowing through their ports to other states.

Although the Court in *Washington Stevedoring* recognized that there were some formal factual distinctions between it and *Michelin*, it extended the *Michelin* "three concerns" analysis to taxation involving exports. The Court pointed out that an export tax need only be measured against the first and third concerns: the export-tax ban of the Import-Export Clause does not serve the second concern, protection of federal revenues, because that objective is satisfied by the Export Clause of Article I, § 9. In sum, the Court decided that an export tax should be tested for its conformance with the first and third policies of the Import-Export Clause, and if the constitutional interests are not disturbed, the tax should not be considered an "Impost or Duty" prohibited by the Constitutional ban.

Among the distinctions drawn by the *Washington Stevedoring* Court between its facts and those in Michelin was that in *Michelin* the tax fell on the goods themselves, whereas in *Washington Stevedoring* the tax fell on stevedoring, the business of loading and unloading ships. The Court noted that a tax on stevedoring does not relate to the value of the goods being transported, and therefore cannot be considered a tax on the goods themselves. *Id.* at 757, 98 S.Ct. at 1402. To reach this conclusion, *Washington Stevedoring* turned briefly to *Canton Railroad*

Co. v. Rogan, 340 U.S. 511, 71 S.Ct. 447, 95 L.Ed. 488 (1951), in which the Court upheld a gross-receipts tax on a railroad that engaged in a variety of services relating to importing and exporting on the grounds that the immunity of services incidental to exporting and exporting was not as broad as the immunity of the goods themselves, a distinction described in Canton Railroad that found favor in *Washington Stevedoring*.

Of course, no bright-line test for distinguishing between goods and related services emerged from *Canton Railroad*, but as the Court in *Washington Stevedoring* noted, *Canton Railroad* did distinguish the tax it upheld from other taxes which the Court had previously invalidated. Among the cases distinguished was *Thames & Mersey*. In the words of the *Washington Stevedoring* Court:

> In [the cases in which the Court had previously struck down taxes,] the State had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves. . . . [T]he stamp tax on bills of lading in Fairbank effectively taxed the goods because the bills represented the goods. The basis for distinguishing Thames & Mersey is less clear because there the tax fell upon marine insurance policies. Arguably, the policies had a value apart from the value of the goods. In distinguishing that case from the taxation of stevedoring activities, however, one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships.

Washington Stevedoring, 435 U.S. at 756 n. 21, 98 S.Ct. at 1402 n. 21.

In its motion, the government suggests that a reading of *Washington Stevedoring* and the cases

leading up to it indicates that there has been a fundamental revision in the way the Supreme Court approaches cases that invoke both the Import-Export Clause and the Export Clause. It argues that there is no meaningful difference between a tax on the proceeds of stevedoring services and a tax on premiums paid for policies of casualty insurance, a transaction the government describes as being incidental to the process of exporting. Taking its cue from *Michelin*, the government says that as applied to IBM in this case the § 4371 tax is "non-discriminatory" because it doesn't "discriminate" against exports, *i.e.*, the tax doesn't target exports as exports but instead is a generally applicable tax on insurance policies written by foreign insurers that applies regardless of whether the insured goods are in the export stream, and because the tax as such is "non-discriminatory" it does not run afoul of the Export Clause.

III

Having carefully considered the parties' briefs and the cases relied on therein, the court cannot agree with the government that *Michelin* and *Washington Stevedoring* control the facts of this case. Plainly enough, the parties agree that § 4371 imposes a "tax," as that term is generally used and understood. And, the court agrees with IBM that the tax imposed by § 4371 is a tax that amounts to a tax on exports. That the imposition of an excise tax on insurance that must be purchased to secure against the risks amounts to a tax on the goods themselves was recognized years ago by the Supreme Court, which wrote that "[i]t cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis." *Thames & Mersey*, 237 U.S. at 26, 35 S.Ct. at 498.

Thus, because the § 4371 tax is essentially a burden on the exportation process under the rule of *Thames & Mersey*, to avoid application of the rule and prevail on its motion the government must demonstrate either that *Thames & Mersey* has been explicitly overruled, or if it has not been, that later precedent more properly controls. The court does not think that the government has successfully demonstrated either of these propositions.

The government argues that *Thames & Mersey* has been overruled because *Washington Stevedoring* overruled its decisions in *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993 (1947), two cases in which the Court invalidated state taxes on the proceeds from stevedoring interstate and international cargoes because they violated the Import-Export Clause. A partial dissent and partial concurrence in *Carter & Weekes* held that the Import-Export Clause prevented the stevedoring tax from applying to cargoes to and from foreign ports, invoking *Thames and Mersey* as grounds for its conclusions regarding exports. The government maintains that because *Washington Stevedoring* overruled *Carter & Weekes*, then *Thames & Mersey* must also have been overruled.

The court rejects this argument. *Carter & Weekes* was explicitly overruled in *Washington Stevedoring*. The Court in Michelin wrote many pages to explain in detail why it was overruling the long-standing rule of *Low v. Austin*. *Washington Stevedoring* does specifically overrule two cases and endorses a new way of examining cases that involve the Import-Export Clause, but the court does not read *Washington Stevedoring* as stating that the Court has abandoned the rule it expanded in *Thames & Mersey* in an analysis of the Export Clause. The court must adhere to the accepted practice of

following Supreme Court precedent unless the Supreme Court clearly states that it is overruling earlier cases and explains why it is doing so. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") Washington Stevedoring overruled two prior decisions that relied on the Import-Export Clause to invalidate taxes on stevedoring. In the absence of explicit instruction from the Supreme Court that its long-standing approach to evaluating challenges under the Export Clause should be disregarded, the court declines to presume that such an instruction has been implicitly given.

Furthermore, the court is not inclined to read *Washington Stevedoring* as overruling *Thames & Mersey* when the Court in *Washington Stevedoring* cites *Thames & Mersey* as a precedential case that in the present context had to be distinguished. In its discussion of *Canton Railroad*, the Court in *Washington Stevedoring* drew parallels to that earlier case, noting that:

> [t]axation in neither [stevedoring nor railroad services] relates to the value of goods, and therefore in neither can it be considered taxation on the goods themselves. The force of *Canton R. Co.* therefore prompts the conclusion that the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value.

Washington Stevedoring, 435 U.S. at 757, 98 S.Ct. at 1403. Clearly, the Court no longer considers a tax on stevedoring to be a tax on exports because stevedoring is a service whose value is not necessarily tied to the value of the goods it serves. In that same discussion, however, the Court distinguished a tax on stevedoring from the tax on the marine insurance policies invalidated in *Thames & Mersey*, stating that "the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships." *Id.* at 756 n. 21, 98 S.Ct. at 1402 n. 21.

Thus, even if the government is correct in its assertion that all taxes that involve exports, whether considered in light of the Export Clause or the Import-Export Clause, should be examined to see if they discriminate against exports *qua* exports, it appears that in the Court's view a tax such as that imposed by § 4371 could indeed be considered a tax on exports in their capacity as exports. The present case is distinguishable from *Michelin* and *Washington Stevedoring*: in *Michelin* the tires had left the import stream and were held to be beyond the import stream and thus outside the scope of the Import-Export Clause, and in *Washington Stevedoring* the Court said that the Import-Export Clause was not violated because stevedoring bore no significant relationship to the goods transported. In the present case, the casualty insurance policies were at all times within the export stream and were significantly related to the exportation process. Whether the § 4371 tax would be impermissible even without the support of *Thames & Mersey* is, we realize, not stated dispositively by the Court, but there is nothing in *Washington Stevedoring* that indicates that *Thames & Mersey* and the connection drawn in that case between insurance policies and the value of goods have been banished into irrelevance.

IV

For the reasons discussed above, the court finds that the § 4371 tax imposed on IBM violates the terms of the Export Clause. Plaintiff's motion for summary judgment is granted, and defendant's motion for summary judgment is denied. The parties are directed to confer and agree on the judgment award that should be entered in favor of the plaintiff. The parties shall advise the court in this regard within thirty days.

/s/ Thomas J. Lydon
THOMAS J. LYDON
Senior Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 94-5164

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 388-89T

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: July 10, 1995 /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

ISSUED AS A MANDATE: August 31, 1995

APPENDIX D

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 388-89T

INTERNATIONAL BUSINESS MACHINES CORPORATION

v.

THE UNITED STATES

[Filed Aug. 31, 1994]

AMENDED JUDGMENT

Pursuant to the court's opinion of July 28, 1994, granting plaintiff's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $1,532,235.87 which covers the assessed taxes and interest, covering tax years 1975-1984 in the manner set forth in the attached exhibit which is incorporated and made part of the judgment herein, plus statutory interest on such assessed taxes and interest as provided by law. No costs.

David A. Lampen
Clerk of Court

August 31, 1994 By: /s/ Jack L. Wilson
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies listing of all plaintiffs. Filing fee is $105.00.

JOINT EXHIBIT 1—ASSESSED TAXES AND INTEREST

Tax Period Ending	Assessed Taxes	Assessed Interest	Total Taxes & Interest
1975			
7503	$20,651.36	$30,543.93	$51,195.29
7506	$20,651.36	$26,386.76	$27,038.13
7609	$20,651.36	$29,363.91	$50,015.27
7512	$20,651.36	$23,955.36	$44,606.73
1976			
7603	$20,651.36	$23,322.29	$43,973.65
7606	$20,651.36	$28,447.95	$49,099.31
7609	$20,651.36	$27,926.69	$48,578.05
7612	$20,651.36	$27,405.42	$48,056.78
1977			
7703	$20,651.36	$23,918.53	$44,569.89
7706	$20,651.36	$3,839.82	$24,491.18
7709	$20,651.36	$25,841.60	$46,492.96
7712	$20,651.36	$25,335.20	$45,986.56
1978			
7803	$20,651.36	$24,893.20	$45,544.56
7806	$20,651.36	$24,426.67	$45,078.04
7809	$20,651.36	$23,979.91	$44,631.27
7812	$20,651.36	$23,547.65	$44,199.02
1979			
7903	$20,651.36	$23,105.65	$43,757.02
7906	$20,651.36	$22,312.73	$42,964.09
7909	$20,651.36	$22,206.98	$42,858.35
7912	$20,651.36	$21,756.45	$42,407.82
1980			
8003	$20,651.36	$20,862.35	$41,513.71
8006	$20,651.36	$19,474.73	$40,126.09
8009	$20,651.36	$19,076.15	$39,727.51
8012	$20,651.36	$18,042.93	$38,694.29
1981			
8103	$20,651.36	$17,293.80	$37,945.16
8106	$20,651.36	$16,191.82	$36,843.18
8109	$20,651.36	$15,504.85	$26,156.22
8112	$20,651.36	$14,603.69	$35,255.05
1982			
8203	$20,651.36	$13,134.56	$33,785.93
8206	$20,651.36	$11,648.71	$32,300.07
8209	$20,651.36	$10,135.65	$30,787.02
8212	$20,651.36	$8,737.56	$29,388.93
1983			
8303	$20,651.36	$7,624.69	$28,276.05
8306	$20,651.36	$6,623.02	$27,274.38
8309	$20,651.36	$5,872.56	$26,523.93
8312	$20,651.36	$5,155.71	$25,807.07
1984			
8403	$20,651.36	$4,412.53	$25,063.89
8406	$20,651.36	$3,779.75	$24,431.11
8409	$20,651.36	$3,082.96	$23,734.33
8412	$20,651.36	$2,406.60	$23,057.96
Total	$826,054.55	$706,181.33	$1,532,235.87

APPENDIX E

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 388-89T
(Senior Judge Thomas J. Lydon)

INTERNATIONAL BUSINESS MACHINES CORPORATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

STIPULATION OF FACTS

The parties hereby stipulate that the following facts, including the attached Joint Exhibit 1, may be accepted as true for purposes of this case. The parties believe that this stipulation of facts is comprehensive, that no genuine issues of material fact exist, and that the case may be resolved on cross motions for summary judgment. Nevertheless, the parties reserve the right to introduce other evidence that is not inconsistent with the facts stipulated. The parties also reserve the right to object to the relevance, materiality, and admissibility of any of the stipulations or the attached exhibit.

PROCEDURAL BACKGROUND

1. Plaintiff, International Business Machines Corporation (IBM), is a domestic corporation incorporated under the laws of the State of New York. IBM's principal place of business is in Armonk, New York.
2. This case involves the four percent federal excise tax imposed by Section 4371(1) of the

Internal Revenue Code (26 U.S.C.) on premiums paid for certain policies of insurance issued by foreign insurers.

3. The periods involved are each of the quarters during the years 1975 through 1984, inclusive (the "quarters in issue").
4. IBM filed federal excise returns for the quarters in issue that did not report any liability under Section 4371.
5. On audit of IBM's federal excise tax returns for the quarters in issue, the Internal Revenue Service ("IRS") determined that IBM was liable for the tax imposed by Section 4371 as a result of certain foreign insurance transactions hereafter described. The IRS assessed IBM for Section 4371 taxes, interest, and "delinquency" or "failure to pay" penalties for each of the quarters in issue (the "assessments").
6. IBM paid the assessments in full, and timely filed claims for refund with the IRS for all amounts paid in satisfaction of the assessments. The IRS denied IBM's claims for refund on December 23, 1988. This tax refund action was timely filed by IBM on July 11, 1989. The parties believe that this Court has jurisdiction of the action under 28 U.S.C. Section 1491(a)(1) and Section 7422 of the Internal Revenue Code (the "Code") (26 U.S.C. Section 7422).
7. Defendant has abated the IRS' penalty assessments and refunded the amounts so assessed to IBM, with interest.

SALES OF IBM PRODUCTS OUTSIDE THE UNITED STATES

8. IBM is a developer and manufacturer of sophisticated information processing systems and related products, sold throughout the

world. During the quarters in issue, sales of IBM products outside the United States were made through a worldwide network of more than 100 wholly owned foreign subsidiary corporations. For example, IBM products were sold using the quarters in issue by corporations organized and operating in Abu Dhabi, Argentina, Belgium, Brazil, Canada, Egypt, Germany, Haiti, India, Japan, Kuwait, Malaysia, Norway, Peru, South Africa, Switzerland, Thailand, the former U.S.S.R., Vietnam, and Zambia.

9. IBM products sold by foreign subsidiaries were manufactured either in their own overseas plants (or in the plants of other IBM foreign subsidiaries) or by IBM at manufacturing plants in the United States.

10. During the quarters in issue, IBM products manufactured in the United States and sold outside the United States through foreign subsidiaries included (but were not limited to) the following items, manufactured at the locations indicated:

Product:	Manufacturing Locations:
Mainframe computers	Poughkeepsie, NY
Tape drivers, large printers, magnetic tape	Tucson, AZ
Disc drives	San Jose, CA
Copiers, toner, supplies	Boulder, CO
Intermediate computers	Rochester, MN, Austin, TX

Personal computers, keyboards	Austin, TX, Boca Raton, FL
Point of sale banking machines, circuit cards	Charlotte, NC
Communication devices, cathode ray terminals	Raleigh, NC
Semiconductors	Manassas, VA, East Peekskill, NY, Burlington, NY
Large circuit boards, specialized intermediate computers	Endicott, NY

11. Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders.

12. Depending upon the particular product, IBM would fill a subsidiary's order either by (1) building the product to the particular specifications contained in a purchase order ("build to order"), or (2) utilizing ongoing production at a factory or inventory at a warehouse ("built to plan").

13. Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were

destined for a United States airport (typically, John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the Far East), but some shipments also were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for 2-5 days, but could remain while awaiting space on an airliner for as long as 30 days. The products would be reloaded at the freight forwarders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, there were unloaded, cleared customs, and loaded on trucks for shipment to their final destination. For purposes of the parties' cross motions for summary judgment, the parties agree that any variations from these typical fact patterns were not significant and are not relevant to the resolution of the motions.

14. When foreign subsidiaries purchased IBM products from IBM during the years in issue, in terms of sale called for title to the products (and the risk of loss) to pass from IBM to the subsidiary when the goods cleared customs in the foreign country. The terms of sale also called for the purchasing subsidiary to bear the cost of insuring the products against damage or destruction during shipment.

INSURANCE COVERING THE SHIPMENT OF IBM PRODUCTS SOLD TO FOREIGN SUBSIDIARIES

15. All U.S.-manufactured products IBM sold to foreign subsidiaries were covered by casualty insurance against damage or destruction during shipment. Insurance was "point to point", that is, covered the risk of loss to goods during transportation by surface or air transportation from the IBM facility in the United States until delivered to the foreign customer or a foreign consolidation center. In some cases, IBM arranged for the insurance; when it did so, insurance was placed with a U.S. insurance carrier, and the cost was billed to the foreign subsidiary. In other instances, the foreign subsidiary placed the insurance; when it did so, the insurance often was with a foreign carrier, which the subsidiary paid for directly. In all cases, both IBM and its foreign subsidiary were listed as insured beneficiaries.

16. When a foreign subsidiary obtained its own insurance coverage with a foreign insurer, the policy covered not only shipments to it by IBM from the United States, but shipments of goods purchased from foreign affiliates in other countries as well. The insurer would charge a separate premium to cover each shipment, the amount of which was determined by the declared value of the particular shipment, multiplied by the premium rate applicable to that shipment. The premium rate depended on such underwriting factors as the place of origin and destination of the goods, the type of goods involved and how they were packaged, the time and distance of the trip, the route and mode(s) of transportation, and the amount of material handling expected during the trip.

17. If damage to an IBM product being shipped to a foreign country occurred while IBM had title to the goods (and the risk of loss), then IBM

would be entitled to the insurance proceeds under the insurance policy (whether issued by a U.S. company or a foreign insurer). If the loss occurred, however, after the importing foreign subsidiary acquired title to the products, the insurance proceeds would be payable to the subsidiary. In the latter case, the subsidiary would use the proceeds to pay IBM the full purchase price of the damaged products, or to reimburse itself for the purchase price, if IBM had already been paid.

18. Since most IBM products shipped to foreign subsidiaries were packaged in containers, damage was frequently not discovered until after the products arrived at their designation. As a practical matter, it was often impossible to determine when a loss occurred and therefore who was legally entitled to receive the policy proceeds. In most cases involving foreign insurance carriers, therefore, the insurance company simply paid the insurance proceeds to the foreign subsidiary which used the proceeds to pay IBM for the goods.

THE ASSESSMENTS

19. The Internal Revenue Service determined that the premiums paid to foreign insurers with respect to U.S. manufactured IBM products sold to its foreign subsidiaries were subject to the four percent excise tax imposed by Section 4371 of the Internal Revenue Code (26 U.S.C.).

20. During the audit, IBM sent questionnaires to its foreign subsidiaries and determined that premiums paid by them to foreign insurers during the year 1980, allocable to U.S.-manufactured IBM products sold outside the United States, totaled $2,065,137. For expediency in making assessments under Section 4371, IBM and the IRS agreed that the foreign

insurance premiums attributable to such products in each of the years 1975-1979 and 1981-1984 were the same as in 1980. Accordingly, the Internal Revenue Service assessed Section 4371 taxes of $82,605 per year, calculated by multiplying the annual premiums by four percent.

21. The Internal Revenue Service's assessments of Section 4371 tax and interest for each of the quarters in issue, which are the amounts in this case, are set forth in Joint Exhibit 1.